

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LORETTA HOYT,

Plaintiff,

v.

LOCKHEED SHIPBUILDING
COMPANY,

Defendant.

C12-1648 TSZ

ORDER

THIS MATTER comes before the Court on Defendant Lockheed Shipbuilding Company's ("Lockheed") motion for summary judgment, docket no. 62. Having reviewed all papers filed in support of and in opposition to the motions, the Court enters the following order.

I. Background

Plaintiff Loretta Hoyt claims that she developed mesothelioma as a result of secondary or "take-home" exposure to asbestos. Her father, Victor Lodahl, was employed by Puget Sound Bridge and Dry Dock as a coppersmith from approximately 1948 to 1954. Id. at ¶¶ 6-7. During the course of his employment, Mr. Lodahl worked

1 with and around asbestos. Id. at ¶ 7. Plaintiff lived at home with her parents during this
2 time period.

3 Plaintiff's ex-husband, Leroy Birkholz, was employed by Puget Sound Bridge and
4 Dry Dock from approximately 1954 to 1958 as a pipefitter. Id. at ¶¶ 4-5. During the
5 course of his employment, Mr. Birkholz worked with and around asbestos. Id. at ¶ 5.
6 During this time period Plaintiff lived with Mr. Birkholz.

7 Plaintiff alleges that Mr. Lodahl and Mr. Birkholz brought home asbestos fibers on
8 their hair, tools, and clothing at the end of the workday. Id. at ¶ 14. While she was living
9 at home with her parents, Plaintiff's mother did the family's laundry in the basement.
10 Hoyt Perpetuation Depo. at 14 (Couture Decl., Ex. 4). Plaintiff's bedroom was also in
11 the basement and dust from her father's work clothes got into her bedroom. Id. at 15.
12 During her marriage to Mr. Birkholz, Plaintiff did all of the couple's laundry. Birkholz
13 Depo. at 20-21 (Couture Decl., Ex. 6). When she washed Mr. Birkholz's work clothes,
14 she would shake them out before washing them because "they were dirty and dusty."
15 Hoyt Perpetuation Depo. at 12 (Couture Decl., Ex. 4).

16 Plaintiff claims that her exposure to the asbestos that her father and ex-husband
17 brought home on their clothes while they worked at Puget Sound Bridge and Dry Dock
18 caused her to develop mesothelioma. She brings this action for damages for personal
19 injuries against Lockheed Shipbuilding Company, the successor-in-interest to Puget
20 Sound Bridge & Dredging Corporation. Id. at ¶ 15. She alleges that Defendant
21 negligently failed to exercise its duty of care to provide its employees with a safe work
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1 environment and that it was reasonably foreseeable that Lockheed's negligence would
2 result in its employee's family members being exposed to asbestos. Id. at ¶¶ 13-14.

3 Lockheed moves for summary judgment on the grounds that it did not owe
4 Plaintiff a duty of care and that injury to Plaintiff was not foreseeable at the time of
5 exposure.

6 **II. Standard**

7 The Court shall grant summary judgment if no genuine issue of material fact exists
8 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

9 The moving party bears the initial burden of demonstrating the absence of a genuine issue
10 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if
11 it might affect the outcome of the suit under the governing law. Anderson v. Liberty
12 Lobby, Inc., 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the
13 adverse party must present affirmative evidence, which "is to be believed" and from
14 which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the
15 record, however, taken as a whole, could not lead a rational trier of fact to find for the
16 non-moving party, summary judgment is warranted. See Beard v. Banks, 548 U.S. 521,
17 529 (2006) ("Rule 56(c) 'mandates the entry of summary judgment, after adequate time
18 for discovery and upon motion, against a party who fails to make a showing sufficient to
19 establish the existence of an element essential to that party's case, and on which that
20 party will bear the burden of proof at trial.'")(quoting Celotex, 477 U.S. at 322)).
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1 **III. Discussion**

2 In order to prevail in an action for negligence, a plaintiff must establish: (1) the
3 existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting injury.
4 Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 618, 220 P.3d 1214
5 (2009). The only element at issue in this motion for summary judgment is the existence
6 of a duty.¹ Lockheed contends that it did not have a duty to the Plaintiff because (1)
7 Washington Courts do not recognize a duty to prevent “take home” asbestos exposure,
8 and (2) the harm to Plaintiff was not foreseeable because Lockheed did not have actual or
9 constructive knowledge of the risk of cancer from “take-home” or “secondary” asbestos
10 exposure during the time-frame that Plaintiff’s father and ex-husband worked at
11 Lockheed.

12 The existence of a legal duty is an issue of law to be decided by the court, Folsom
13 v. Burger King, 135 Wn.2d 658, 671 (1998), and generally includes a determination of
14 whether the harm was foreseeable. Rochon v. Saberhagen Holdings, Inc., 2007 WL
15 2325214, at *1 (Div. 1, 2007).

16 **1. Does a corporation have a duty to prevent “take home” or secondary** 17 **exposure to asbestos?**

18 Plaintiff contends that under Washington law a corporation has a duty to prevent
19 “take home” exposure to asbestos. She relies on Arnold v. Saberhagen Holdings, Inc.,
20 157 Wn. App. 649 (Div. 2, 2010) and Rochon v. Saberhagen Holdings, Inc., 2007 WL

21 ¹ Lockheed does not contest for purposes of summary judgment that Plaintiff’s father and ex-husband
22 were exposed to asbestos attributable to Lockheed. Defendant’s Motion for Summary Judgment at 5;
23 Reply at 1-2.

1 2325214 (Div. 1, 2007). Lockheed argues that it did not owe Plaintiff a duty of care
2 because she was not an employee or an invitee. Lockheed relies on cases from several
3 other jurisdictions to support its position and argues that, to the extent Arnold suggests
4 otherwise, the Court should conclude that Arnold was wrongly decided.

5 Because the existence of a common law duty is an issue of state law, the task of
6 this Court is to predict how the Washington State Supreme Court would rule on this
7 question. ““In the absence of [a decision from the Washington State Supreme Court], a
8 federal court must predict how the highest state court would decide the issue, using
9 intermediate appellate court decisions, decisions from other jurisdictions, statutes,
10 treatises, and restatements as guidance.”” Arizona Elec. Power Coop., Inc. v. Berkeley,
11 59 F.3d 988, 991 (9th Cir. 1995) (quoting In re Kirkland, 915 F.2d 1236, 1239 (9th Cir.
12 1990)). “However, where there is no convincing evidence that the state supreme court
13 would decide differently, ‘a federal court is obligated to follow the decisions of the
14 state’s intermediate appellate courts.’” Lewis v. Tel. Employees Credit Union, 87 F.3d
15 1537, 1545 (9th Cir. 1996) (quoting Kirkland, 915 F.2d at 1239). For the following
16 reasons, the Court concludes that the Washington State Supreme Court would recognize
17 an employer’s duty to take reasonable precautions to protect employee’s family members
18 from “take-home” exposure to asbestos.

19 The issue of whether a company may be liable for “take home” or secondary
20 exposure to asbestos is not an issue of first impression in Washington. In Arnold v.
21 Saberhagen Holdings, Inc., the plaintiffs sued Lockheed and others for asbestos-related
22 injuries stemming from Ruben Arnold’s work as an insulation contractor for Lockheed in
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1 the 1960s. 157 Wn. App. 653. The claims were twofold. First, Ruben’s estate asserted a
2 primary liability claim for Ruben’s exposure to asbestos at Lockheed after he passed
3 away from mesothelioma. Second, Ruben’s wife and son asserted injuries from “take
4 home exposure” to asbestos, claiming that Ruben brought home asbestos fibers on his
5 work clothing and exposed them to the dangerous substance.² Id. at 653. The plaintiffs
6 asserted that Lockheed “owed common law and statutory or regulatory duties both to
7 [Ruben] and to his family members at home to protect them from the hazards of exposure
8 to asbestos on the premises.” Id. at 654.

9 After the trial court granted summary judgment dismissing the plaintiffs’ claims
10 against Lockheed, the Court of Appeals reversed. The focus of the Court’s analysis was
11 on Lockheed’s duty to Ruben as a landowner and as a general contractor. Id. at 661.
12 However, the Court reversed the summary judgment dismissal of the wife and son’s
13 claims for “take-home exposure,” concluding that there were material issues of fact for
14 trial. Id. at 653 (“We affirm the trial court’s grant of summary judgment to Lockheed
15 with regard to Daniel’s primary exposure claim, but reverse with regard to the Arnolds’
16 other claims.”), 671. In so holding, the Court concluded that Lockheed “owed common
17 law and statutory or regulatory duties both to [Ruben] *and to his family members at*
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20 ² Daniel Arnold, Ruben’s son, also brought a claim for direct exposure to asbestos based on his work as
21 an insulator at a Lockheed shipyard for a period in 1979-80. During this period, Daniel wore a protective
22 suit and a respirator. Arnold, 240 F.3d 165. The Court of Appeals affirmed the summary judgment
23 dismissal of Daniel’s direct exposure claim. Id. at 174. As a result, only Daniel’s claim arising from
secondary exposure was addressed in the appellate court’s decision.

1 *home to protect them from the hazards of exposure to asbestos* on the premises.” Id. at
2 654 (emphasis added).

3 The Washington State Court of Appeals also addressed the issue of liability for
4 “take home” exposure to asbestos in Rochon v. Saberhagen Holdings. In that case, the
5 Washington State Court of Appeals addressed the same issue raised in the present motion
6 for summary judgment: whether Washington law recognizes an employer’s duty of care
7 to prevent secondary or “take home” exposure to asbestos. 2007 WL 2325214 (Div. 1,
8 2007). There, the plaintiff’s husband was exposed to asbestos at work and the plaintiff
9 allegedly inhaled asbestos fibers while laundering her husband’s clothing and developed
10 mesothelioma as a result. Id., at *1. The plaintiff brought a claim for personal injury
11 against her husband’s employer under a general negligence theory, arguing that the
12 employer breached its duty of care by failing to prevent her “take home” exposure to
13 asbestos. The trial court dismissed plaintiff’s claim, concluding that the defendant did
14 not owe her a duty of care. Id. The court of appeals reversed, concluding that the cause
15 of the plaintiff’s illness was the employer’s own affirmative act of operating its factory in
16 an unsafe manner. Id. at *3. Thus, the Court reasoned, the employer “had a duty to
17 prevent injury from an unreasonable risk of harm that it itself created.” Id.

18 In reaching this conclusion, the Court rejected the defendant’s argument that
19 “employer liability does not extend to employees’ spouses and homes, and premises
20 liability does not extend outside of the premises.” Id. The Court also rejected the
21 argument that extending a duty to employers in “take home” exposure cases “will expose
22 employers to endless litigation.” Id. at *4. The Court concluded that liability was
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1 sufficiently limited because liability only extends if the victim “proves that his or her
2 injury was a foreseeable consequence” of the employer’s actions. Id. at *5.

3 Although Rochon is an unpublished decision, it also provides guidance as to the
4 result that the Washington State Supreme Court would likely reach if faced with the same
5 question. The Court notes that Rochon relies on the Court of Appeal’s published
6 decision in Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784 (Div. 1, 2005). In
7 that case, the plaintiff alleged claims in negligence and strict product liability against the
8 manufacturer of asbestos insulation. Id. at 787. Plaintiff claimed that he was exposed to
9 asbestos fibers that his father brought home on his clothing and tools from his work as an
10 insulator at an oil refinery and that he developed lung cancer as a result of the exposure.
11 Id. The trial court dismissed plaintiff’s claim on summary judgment, concluding that a
12 household member was not a “user” of the product. Id. The Court of Appeals reversed,
13 holding that a household member may be a product user if his exposure was reasonably
14 foreseeable. Id. at 793. While Lunsford involved claims against a manufacturer rather
15 than an employer for “take home” exposure to asbestos and is therefore not directly on
16 point on whether a duty existed in the present case, the court’s analysis is nevertheless
17 helpful. The decision demonstrates, as a factual matter, that a family member may be a
18 foreseeable victim of asbestos exposure in a negligence action premised on “take home”
19 exposure.

20 Lockheed argues that Arnold and Rochon are not good law, resting its position on
21 the Washington Supreme Court’s opinion in Simonetta v. Viad Corp., 165 Wn.2d 341
22 (2008). However, Simonetta does not require a different result. In Simonetta, a former
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1 Navy machinist brought an action against the manufacturer of an evaporator used for the
2 desalinization of seawater. After the evaporator was shipped to the Navy, it was
3 insulated with asbestos products manufactured by another company. Plaintiff claimed
4 that he was required to remove the asbestos insulation and then reinsulate the machine in
5 order to service it. He alleged that he contracted lung cancer as a result of his exposure to
6 asbestos in this manner and that the manufacturer of the evaporator was liable in
7 negligence for failure to warn of the danger. After the trial court dismissed plaintiff's
8 claim, concluding that the evaporator itself did not produce the injury even though the
9 defendant manufacturer knew or should have known that its product would be insulated
10 with asbestos, plaintiff appealed. Id. at 346-47. The Court of Appeals reversed,
11 concluding that the manufacturer had a duty to warn. Defendant appealed and the
12 Washington State Supreme Court granted review. Id. at 347.

13 On appeal, the Washington Supreme Court addressed the issue "of whether under
14 the common law a manufacturer can be held liable for failure to warn of the hazards of
15 another manufacturer's product." Id. at 345. The Court concluded that because the
16 manufacturer was not within the chain of distribution of the dangerous product, it had no
17 duty to warn the plaintiff of the dangers associated with asbestos insulation. Id. at 363.
18 In reaching its conclusion, the Court noted in a footnote that it agreed with the Court of
19 Appeals that "[f]oreseeability does not create a duty but sets limits once a duty is
20 established." Id. at 349 n.4. Lockheed argues based on this statement that the Supreme
21 Court would not follow Rochon and Arnold, because those cases recognize foreseeability
22 as relevant in determining whether a party has a duty to prevent harm.
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1 This Court does not read the Supreme Court’s footnote in Simonetta as a
2 wholesale rejection of the relevance of foreseeability to the analysis of whether a party
3 owes a duty of care in a particular situation. The foreseeability of injury was not disputed
4 in that case. The issue was whether the manufacturer had a duty to warn workers like
5 Simonetta “of a known danger.” Simonetta v. Viad Corp., 137 Wn. App. 15, 23, 151
6 P.3d 1019 (Wash. App. Div. 1, 2007). The fact that the “foreseeability of injury” plays a
7 role in determining whether a party has a duty to protect others from a risk of harm is
8 supported by numerous other opinions from the Washington Supreme Court. See, e.g.,
9 Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002) (whether a duty
10 exists depends, in part, on whether the harm that occurred was foreseeable); Hansen v.
11 Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992) (whether a municipality owes a duty in
12 a particular situation generally includes a determination of whether the incident that
13 occurred was foreseeable); King v. City of Seattle, 84 Wn.2d 239, 248, 525 P.2d 228
14 (1974) (“foreseeability of the risk of harm to the plaintiff is an element of the duty
15 question”); Berglund v. Spokane County, 4 Wn.2d 309, 321, 103 P.2d 355 (1940)
16 (whether county owed duty to negligent driver was a question of foreseeability). There is
17 no indication in Simonetta that the Supreme Court intended to overrule these prior
18 decisions. Lockheed’s argument that foreseeability plays no role in the determination of
19 whether a duty exists is not consistent with existing case law in Washington.

20 Defendant also cites to a number of cases from other jurisdictions where the court
21 concluded that there was no duty to protect the plaintiff from “take home” or secondary
22 asbestos exposure. See, e.g., Holdampf v. A.C. & Sons, Inc. (In re New York City
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1 Asbestos Litigation), 5 N.Y.3d 486, 493-96 (2005); CSX Tranp., Inc. v. Williams, 278
2 Ga. 888 (2005); Adams v. Owens-Illinois, Inc., 119 Md. App. 395 (1998). The Court
3 concludes that these cases are not persuasive. “[W]here there is no convincing evidence
4 that the state supreme court would decide differently, ‘a federal court is obligated to
5 follow the decisions of the state’s intermediate appellate courts.’” Lewis, 87 F.3d at 1545
6 (quoting Kirkland, 915 F.2d at 1239).

7 Here, Plaintiff contends that Lockheed owed her a duty to “exercise reasonable
8 care to protect others from an unreasonable risk of harm arising out of its own affirmative
9 act of operating its shipyard in an unsafe manner.” Response at 17. This is consistent
10 with the Court’s holding in Rochon that a party has a duty to prevent unreasonable risk of
11 harm to others from his or her own actions. 2007 WL 2325214, at *3; see also
12 Restatement Second of Torts, § 302 cmt. a (“Anyone who does an affirmative act is
13 under a duty to others to exercise the care of a reasonable man to protect them against an
14 unreasonable risk of harm to them arising out of the act.”). While recognizing that the
15 Washington Supreme Court has not addressed the issue of whether an employer owes a
16 duty to the family members of its employees to protect them from “take home” exposure
17 to asbestos, the Court concludes that the Washington Supreme Court would acknowledge
18 this duty under the state common law. This conclusion is supported by the Washington
19 State Court of Appeals decisions in Arnold and Rochon holding that an employer has a
20 duty to prevent a plaintiff’s injury from “take home” exposure to asbestos. Arnold, 157
21 Wn. App. 653; Rochon, 2007 WL 2325214, at *4. It is also supported by the thoughtful
22 reasoning of the Tennessee Supreme Court in Satterfield v. Breeding Insulation Co.,
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1 holding that an employer has a duty to use reasonable care to prevent exposure to
 2 asbestos fibers by persons who come into close regular contact with its employees
 3 contaminated work clothes over an extended period of time. 266 S.W.3d 347, 352
 4 (2008). Lockheed has not provided “convincing evidence” that the state supreme court
 5 would reach a different conclusion than the Court of Appeals did in Arnold and Rochon.

6 **2. Was the risk of Plaintiff developing mesothelioma from secondary**
 7 **asbestos exposure foreseeable at the time of exposure?**

8 The second issue raised by Lockheed is whether injury to the Plaintiff was
 9 foreseeable. Negligence is conduct that “falls below the standard established by law for
 10 the protection of others against unreasonable risk.” Hunsley v. Giard, 87 Wn.2d 424,
 11 435 (1976) (quoting W. Prosser, Handbook of the Law of Torts § 43, at 250 (4th
 12 ed.1971)). Generally, an actor’s conduct falls below the standard of care if it “involves a
 13 foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to
 14 the danger.” Id. If a defendant cannot reasonably foresee any injury as the result of his
 15 action, the person who created the risk generally does not have a duty to prevent it.
 16 Parrilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007); accord Rochon, 2007
 17 WL 2325214, at *1-2. “Foreseeability is used to limit the scope of the duty owed
 18 because actors are responsible only for the foreseeable consequences of their acts.”
 19 Schooley v. Pinch’s Deli Market, Inc., 134 Wn.2d 468, 477 (1998) (citing Burkhart v.
 20 Harrod, 110 Wn.2d 381, 395 (1988)).

21 In order for harm to be foreseeable, a plaintiff must demonstrate that the defendant
 22 knew or should have anticipated an unreasonable risk of danger to the plaintiff or others
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1 in his class. See, e.g., Lockwood v. AC & S, Inc., 44 Wn. App. 330, 366 (1986) (In a
2 products liability action brought on a theory of negligence, a plaintiff must prove that the
3 defendant knew or should have anticipated an unreasonable risk of danger to him or
4 others in his class); J.N. v. Bellingham Sch. Dist., 74 Wn. App. 49, 58 (1994) (Wrongful
5 activities are foreseeable “only if the [defendant] knew or in the exercise of reasonable
6 care should have known of the risk that resulted in their occurrence.”); Brant v. Market
7 Basket Stores, Inc., 72 Wn.2d 446, 451-52 (1967) (affirming trial court’s dismissal of
8 premises liability slip-and-fall claim where there was no evidence that store employees
9 knew or should have known of the slippery condition). Normally, foreseeability is an
10 issue for the trier of fact and the Court will decide foreseeability as a matter of law only
11 where reasonable minds could not differ. Id. (citing Christen v. Coates, 113 Wn.2d 479,
12 492 (1989)).

13 In the present case, Lockheed contends that it did not owe a duty to the Plaintiff
14 because the risk of developing mesothelioma from secondary or “take home” exposure to
15 asbestos was not foreseeable in the period of 1948-1958. Lockheed contends that, while
16 the risk to its employees from asbestos exposure may have been foreseeable in the 1950s,
17 the risk to Plaintiff was not foreseeable because the first epidemiological studies tying
18 lung cancer to “take home” asbestos exposure did not appear in the medical literature
19 until the 1960s.³ Lockheed points to several decisions from other jurisdictions where
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21 ³ The Parties’ dispute when the first study was published that would have put Lockheed on “notice” of the
22 risk of “take home” asbestos exposure. Plaintiff argues that a 1960 article by Dr. J.C. Wagner in the
23 British Journal of Industrial Medicine, in which he detailed mesothelioma case studies in South Africa,

1 courts have concluded that the risk of harm from “take-home” asbestos exposure was not
2 foreseeable until, at the earliest, the publication of epidemiological studies in the 1960s
3 linking mesothelioma to household exposure to asbestos dust. See, e.g., Martin v.
4 Cincinnati Gas & Electric Co., 561 F.3d 439, 444-45 (6th Cir. 2009) (holding that
5 “without any published studies or any evidence of industry knowledge of bystander
6 exposure there is nothing” to support charging defendant with knowledge of risk of “take
7 home” exposure during the period from 1951-63); Exxon v. Altimore, 256 S.W.3d 415,
8 425 (2008) (reversing award of damages based on secondary exposure that occurred
9 between 1942-1972 because plaintiff failed to present evidence of knowledge of risk to
10 family members of asbestos workers during the relevant time-frame); Alcoa v. Behringer,
11 235 S.W.3d 456, 460-61 (2007) (not foreseeable in the 1950s to an ordinary employer
12 that used, but did not manufacture, asbestos that intermittent, non-occupational exposure
13 to asbestos could put people at risk of contracting serious illness). This Court conducted
14 an independent review of the case law, and found no case in which a court has concluded
15 that the risk of “take home” exposure was foreseeable in the 1950s.

16 Plaintiff responds that Lockheed “knew or should have known” of the risk of “take
17 home” exposure during the 1950s because asbestos was a known workplace hazard and
18 the general risk of developing lung cancer from asbestos exposure was well documented
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20 warned of the risk of secondary exposure. Castleman Decl. at 7. Defendant contends that the first
21 published study of lung cancer resulting from secondary or “take home exposure” was published in 1965
22 by Newhouse and Thompson. This is a dispute without a difference in the present case because Plaintiff’s
23 exposure occurred prior to the publication of either the Wagner study or the Newhouse and Thompson
study.

1 in the medical community at that time. As evidence that Lockheed had knowledge of the
2 risk posed by asbestos exposure in the 1950s, Plaintiff points to the minutes from the
3 Pacific Coast Shipyard Safety Conference attended by Lockheed in 1945, which indicate
4 that the topic of occupational risk from asbestos insulation was covered. See Couture
5 Decl., Ex. 15. In addition, she points to the 1952 Walsh Healy Public Contracts Act
6 (“Act”), which was incorporated into Lockheed’s contracts with the United States Navy,
7 Couture Decl., Exs. 16-17, and lists asbestos as a potentially harmful workplace dust and
8 contains various regulations aimed at reducing exposure. Id. Finally, Plaintiff provides
9 the expert report of Dr. Barry Castleman. Castleman Report (Couture Dec., Ex. 19). Dr.
10 Castleman provides an extensive overview of the medical literature concerning asbestosis
11 and asbestos related cancers and opines that the “hazard of asbestos exposure to families
12 of the workers was scientifically knowable before 1954 when Mrs. Hoyt’s ex-husband,
13 Mr. Birkholz, began bringing asbestos home on his clothes from his work at the
14 Lockheed shipyard.” Id. at 14.

15 Plaintiff argues that the risk to her was foreseeable because Washington case law
16 has long held that foreseeability does not require knowledge of the specific harm, but
17 rather that “the harm sustained must be reasonably perceived as being within the general
18 field of danger covered by the specific duty owed by the defendant.” Christen v. Lee,
19 113 Wn.2d 479, 492 (1989) (internal quotation omitted); see also Bergland v. Spokane
20 Cnty, 4 Wn.2d 309, 320 (1940) (holding that “if the harm suffered falls within the general
21 danger area, there may be liability, provided other requisites of legal causation are
22 present.”); Rikstad v. Holmberg, 76 Wn.2d 265 (1969) (“[P]ertinent inquiry is not
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1 whether the actual harm was of a particular kind which was expectable. Rather the
2 question is whether the actual harm fell within a general field of danger which should
3 have been anticipated.”). Plaintiff contends that because the risk of harm to Lockheed’s
4 employees was known in the 1950s, “take home” exposure fell within the “general field
5 of danger.”

6 The Court concludes that the risk of danger from “take home” asbestos exposure
7 to family members of Lockheed employees was not foreseeable in the 1950s. Although
8 Plaintiff’s situation is sympathetic, the evidence that Plaintiff proffers to support
9 Lockheed’s knowledge of the risk of “take home” asbestos exposure in the 1950s is
10 insufficient to create a material issue of fact for trial. There is no evidence that Lockheed
11 had actual knowledge of the danger of secondary or “take home” exposure until the
12 1960s. The first case study of non-occupational asbestos exposure was published by
13 Newhouse and Thompson in 1965. Alcoa, 235 S.W.3d at 461. Because there is no
14 evidence of actual knowledge, the question is whether the Defendant should have known
15 of the risk: “that is, was such a risk foreseeable to them based on ‘common knowledge at
16 the time and in the community.’” Martin, 561 F.3d at 445 (quoting Restatement (Second)
17 of Torts § 289(a)).

18 Plaintiff has not proffered any evidence that the risk of “take home” exposure was
19 foreseeable based on common knowledge at the time and in the community. The
20 regulations that Plaintiff cites only address occupational exposure and do not make any
21 mention of bystander exposure. The first regulations that expressly mandated restrictions
22 on allowing asbestos to be carried home on workers clothing were the Occupational
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1 Safety and Hazard Administration regulations instituted in 1972. Alcoa, 235 S.W.3d at
2 461.

3 Dr. Castleman's expert report is also insufficient to demonstrate that foreseeability
4 of harm to the plaintiff during the time-frame of her exposure. Dr. Castleman offered the
5 same testimony in Martin v. Cincinnati Gas & Electric Co., agreeing that the first
6 published studies showing a risk of mesothelioma from "take-home" exposure were not
7 published until the 1960s, but testifying that the risk of bystander exposure to family
8 members was "knowable" beginning in the 1950s. 561 F.3d at 444-45. This Court
9 agrees with the Martin court that "it is insufficient that the danger was merely
10 knowable—the knowledge has to have been available to the defendant." Id. at 445. As
11 in Martin, there has been no showing here of any general knowledge of bystander
12 exposure in the industry during the 1950s. Id.

13 The evidence that Plaintiff cites in opposition to Defendant's motion for summary
14 judgment supports the conclusion that in the 1950s Lockheed knew or had constructive
15 knowledge that asbestos exposure caused lung disease in workers with prolonged
16 exposure. However, nothing that Plaintiff cites could lead a reasonable trier of fact to
17 conclude it was foreseeable that the wife of a Lockheed employee might contract lung
18 cancer as a result of being exposed to asbestos carried home on the clothes of her
19 husband. For this reason, the Court concludes that there is no genuine issue of material
20 fact and Defendant's motion should be granted.

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